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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 147

K–91, INC., PETITIONER

v.

GERSHWIN PUBLISHING CORPORATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On October 9, 1967, this Court invited the Solicitor General to express the views of the United States on this case. This memorandum is filed in response to that request.

STATEMENT

This is an action for infringement of the copyrights on some 183 recorded musical compositions (F6).[1] Respondents, the owners of the copyrights, sued petitioner, a corporation operating radio station KIXI in Seattle, Washington. In 1961 and 1962, that station gave public performances for profit of the compositions by broadcasting recordings of them without pay-

[1] "F" refers to the Findings of Fact made by the District Court.

ing any royalties and without the owners' consent (F2, 3, 4, 6, 7).[2] Some of the defendant radio stations have been engaged in such a practice for at least 10 years (F8).

Petitioner admitted the infringement of the copyrights, but defended on the ground that respondents could not maintain their suit because, as members of the American Society of Composers, Authors and Publishers ("ASCAP") they had formed an unlawful conspiracy in violation of the antitrust laws[3] which was engaged in price-fixing and block-booking of its members' works (Pet. App. 5, 13). It counterclaimed, seeking treble damages and an injunction against further renewal of the copyright (Pet. App. 14).

ASCAP is an unincorporated membership association of some 8,000 authors, composers, and publishers who own copyrights in various separate musical compositions (F16). It licenses these works for nondramatic public performances (F18). ASCAP's musical repertory, which is constantly changing as new copyrights are added and old copyrights expire (F23), includes more than one million works (Pet. App. 6).

Each respondent in the instant case has granted ASCAP the non-exclusive right to license its works

[2] Suits were also filed against two other Washington corporations operating radio stations and an individual officer of one of them. However, these defendants did not appeal from the district court's adverse ruling.

[3] Petitioner also asserted that respondents had violated laws of the State of Washington governing copyright protection (Chapter 19.24 R.C.W.), and were barred from relief by the "unclean hands" doctrine because they had unlawfully extended their individual copyright monopoly. Neither of those issues is presented in the petition for certiorari.

for non-dramatic public performances for profit (F21). This licensing activity is regulated and controlled by a consent decree entered in *United States* v. *ASCAP*, S.D.N.Y., Civ. No. 13–95 [4] (Br. in Opp. App. 1a–17a). As pertinent here, the decree requires ASCAP to "grant any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Par. VI). However, the decree forbids ASCAP from granting "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do * * *" or the composer cannot be located within 30 days (Par. VI). Upon receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." ASCAP must avoid discrimination in fees (Par. VIII), and must offer comparable fees to all applicants similarly situated (Par. IX(C)). If the parties are unable to agree upon a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply [to the District Court for the Southern District of New York] for the determination of a reasonable fee * * *" (Par. IX). In such a proceeding ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (Par. IX).

In addition, the 1950 consent decree forbids ASCAP from charging license fees for commercial programs which are based upon a percentage of

[4] CCH Trade Cases, 1950–1951, ¶ 62,595.

income from programs not including ASCAP compositions, unless the broadcaster desires such a license (Par. VII(A)). It also requires ASCAP to offer per program licenses for commercial programs for a flat fee or for a percentage of revenue from the program in which ASCAP music is played (Par. VII(B)). ASCAP must offer "a genuine economic choice between per program and blanket licenses" to stations with relatively few commercial announcements, and is restrained from influencing the licensee to negotiate for blanket licenses prior to negotiating a per program license (Par. VII (B) and (C)).

For radio stations located in the State of Washington a special arrangement under the decree was established in a consent order.[5] The order provides for two types of licenses: A blanket radio license and a per program radio license. Both licenses grant the licensee the right to perform any composition in the ASCAP repertory. The blanket license fee is 2.125 percent of the licensee's overall revenues from sale of time on the air, after certain deductions. The per program license fee is 8 percent of the gross revenues derived from the particular programs in which ASCAP compositions are performed (F38–45; Pet. 8).

Petitioner has never applied for either form of license; nor has it ever sought any other kind of license (F48). Since ASCAP's licenses are non-exclusive, respondents also have the right individually to

[5] This order resulted from differences between ASCAP and certain Washington broadcasters concerning the effect of a Washington State statute, R.C.W. 19.2., which makes it unlawful for combinations of copyright holders to issue licenses in the State of Washington for the right of public performance of their copyrighted works, except on a per piece basis (see Br. in Opp. 11–15; F38–45).

license their works on any basis, per piece or otherwise, which is mutually agreeable to applicants and themselves. Petitioner has never attempted to obtain such a license (F50–51).

The parties stipulated that it would be virtually impossible for broadcasters and copyright holders to arrange separate licenses and payments for each performance on radio of a copyrighted composition (R. 30, Agreed Fact 50). And the district court found that a central licensing agency such as ASCAP is the only practical way that copyright proprietors may enjoy their rights under the federal copyright laws and that broadcasters and others may conveniently obtain licenses for the performance of copyrighted music (F25). It found that single copyright owners cannot deal individually with all users or individually police the use of their songs (F25); and that a single radio station may broadcast as many as 60,000 performances of recorded musical compositions per year involving as many as 6,000 separate compositions (F11–12).

The district court concluded that the defendant radio stations had infringed the respondents' copyrights and that petitioner's defenses and counterclaims under the antitrust laws were without merit (Conclusions of Law 2, 15).[6] On appeal by petitioner, the Court of Appeals for the Ninth Circuit affirmed (Pet. App. 26, 27). The court held that no issue was presented as to whether the decree immunized ASCAP from further prosecution for violation of the antitrust laws. It determined, however, that ASCAP

[6] Petitioners and ASCAP have entered into a retroactive license agreement which as extended runs from January 1, 1959, to December 31, 1967 (Br. in Opp. 15).

was not a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. Noting that when an applicant claims that ASCAP's fee is unreasonable, the court which entered the consent decree can be asked to fix the fee, the Ninth Circuit concluded that ASCAP cannot fix prices because "so long as ASCAP complies with the decree, it is not the price fixing authority," and indicated its disagreement with the view "that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree" (Pet. App. 18). In addition, the court concluded that because ASCAP's licensing authority is not exclusive and prospective licensees may therefore seek individual arrangements with individual composers, the activities disclosed by the record did not violate the antitrust laws (Pet. App. 19).

DISCUSSION

In substance, the question presented by the present petition is whether the bulk-licensing methods by which ASCAP's members market rights to perform publicly for profit recordings of their copyrighted musical compositions violate the antitrust laws. The court of appeals concluded that no antitrust violations were shown, after finding "that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree" (Pet. App. 18), and pointing out that music users may make individual arrangements with separate copyright holders if they

wish, instead of dealing with them through ASCAP. In the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions—the result below, in our view, seems correct, and review by this Court would not appear to be warranted.

We do not understand the court below to have held that the consent decree now in force against ASCAP of itself makes lawful what would otherwise be unlawful (see Pet. App. 17–18). To the extent that ASCAP's activities, whether under the consent decree or unregulated, violate the antitrust laws, both the United States and private parties have a continuing remedy under the Sherman Act. Nothing in the holding below is to the contrary.

The existence and operation of agencies which collectively license the right to perform musical works raise difficult problems under the antitrust laws. See, *e.g., Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S.D.N.Y.); *M. Witmark & Sons* v. *Jensen,* 80 F. Supp. 843 (D. Minn.); *Affiliated Music Enterprises* v. *SESAC Inc.,* 60 F. Supp. 865, 875 (S.D.N.Y.). Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the

relevant economic setting—here, the relationship between the business of recorded music and commercial broadcasting.

The sale of the right publicly to perform for profit a copyrighted musical work, through the playing of a record of the composition, is not wholly comparable to the sale of a manufactured product or the sale of a license to make, use or vend a patented product. Compare *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, with *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U.S. 191, 197. Broadcast of a recorded song over the radio is an intangible, audible event of a few minutes' duration. The resulting public "performance" for profit is not an alienable object like a copyrighted film or the phonograph record itself. The "performance" cannot be owned or transferred; it occurs only while the recording is being played over the air. Each playing is a separate performance subject to the copyright holders' control over performing rights. Congress has made that right wholly separate from the right to reproduce and sell recordings of the copyrighted work (17 U.S.C. 1(e)).

The exclusive right to make (*i.e.,* copy) and vend copyrighted works is analogous to the right to make and vend patented products, and the same antitrust considerations have been applied to abuses of these exclusive rights as are applied to patent rights. *United States* v. *Loew's Inc.,* 371 U.S. 38; *United States* v. *Paramount Pictures,* 334 U.S. 131. However, whatever the legality of a combination of copyright holders to pool and jointly sell these incidents of their copyrights, performing rights for recorded

music are, for obvious practical reasons, subject to somewhat different considerations.

The market for the evanescent right to broadcast a piece of recorded music is completely unlike the market for the right to perform the music in a commercial film's sound-track. Cf. *Alden-Rochelle, supra,* and *Witmark, supra.* Recordings are available everywhere to everyone, without distinction between home and commercial users, and the copyright holders have no voice in their sale. Once the holder has agreed to a recording of his work, it may be recorded by any company upon the giving of appropriate notice subject to the payment of the royalty of two cents per record (17 U.S.C. 1(e)). There are over 4,100 AM and 1,744 FM broadcasting stations located in every part of the United States (FCC Ann. Rep., pp. 106, 110 (1966)). Most of these stations broadcast recorded music for a substantial part of their operating day. They may acquire ownership of any recording they wish, and in the present state of technology there appears to be no effective means by which the enormous number of separate performances broadcast each year by commercial stations across the nation can be accounted for by copyright holders. Nor is it feasible for these stations to deal on a "per piece" basis with the thousands of individual copyright holders across the country in order lawfully to exploit recorded music, for the value of the right to broadcast a single performance of one recorded composition is far less than the cost of negotiating a separate license. It would appear, therefore, that there must be some form of centralized licensing system which serves the

mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished.

The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344; *Chicago Board of Trade* v. *United States*, 246 U.S. 231. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year,[7] the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their

[7] Individual stations broadcast thousands of playings of musical compositions each year, and ASCAP has in excess of one million musical compositions in its repertory at any one time (see Pet. App. 6).

works in a common pool to all who wish to use them. ASCAP's repertory includes a large percentage of the nation's copyrighted music. This results in a situation which can lead to abusive discriminations among users, if not effectively regulated. Thus, it is quite reasonable to require ASCAP to offer the same terms to all users similarly situated. And because users' requirements for separate pieces are continuous, the volume of demand enormous, and the value of each single performance small, separate negotiations on a per piece basis are not practicable. There is simply no escaping, as a practical matter, the licensing of the works in bulk. Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the individual copyright holder should also be preserved for those who might be able to take advantage of it. Therefore, the right to license in bulk delegated to the collective agency must be nonexclusive, so that users have the option of choosing a blanket license or negotiating with individual copyright holders. Cf. *United States* v. *Paramount Pictures,* 334 U.S. 131, 159. These are, of course, some of the central terms of the government's present consent decree against ASCAP.

Petitioner maintains that individual arrangements are simply not practical (Pet. 17). We agree that in most, if not all, instances this is true.[8] But this simply reinforces the justification for a blanket licensing system. Indeed, petitioner seems to suggest

[8] Broadcasters with special needs may find it feasible to deal directly with publishers.

that ASCAP might constitute a lawful arrangement if it offered a greater variety of license packages, for example, western, religious, rock, classical, etc. (Pet. 7). Thus, petitioner concedes that the issue is not the validity of ASCAP's existence in the field of licensing recorded music, or the legitimacy of its bulk licensing as such in this field, but rather the size of the package ASCAP offers.

Alternatively, petitioner argues that its objections might be avoided if ASCAP were required to negotiate licenses with recording companies so that the performance rights would be sold at the source, *i.e.*, anyone acquiring ownership of the record would also own the right to perform it publicly for profit.[9] But there is nothing in the record to indicate that recording companies have ever sought such rights, that they have any economic incentive to do so, or that ASCAP has ever attempted to prevent them from obtaining such licenses. The reasons for this readily suggest themselves. Such companies earn their income from the sale of recordings, not from the public performance of the recording for profit. Moreover, the value of the performing right for a single song

[9] Such an arrangement has been adopted under the ASCAP decree with respect to the performance of music incorporated into the sound track of motion pictures distributed to movie exhibitors. Prior to 1948 ASCAP required exhibitors to obtain a license from it in order to play the music on the sound track of films they had rented. The 1950 amendment to the decree forbade this, thus requiring ASCAP to negotiate with the motion picture producers a license for public performance of the music which would operate to the benefit of anyone renting the film. See Timberg, *The Antitrust Aspects of Merchandising Modern Music*, 19 Law & Contemp. Prob. 294 (1954).

cannot be determined until it has been exposed to the public and the extent of demand for its playing can be assessed. Finally, since the same record may be used at home or in the broadcast studio, the price of the performing right would be reflected in the price of the record sold to the general public, thus requiring the record-buying public to subsidize the operating costs of radio stations which broadcast the musical compositions.

If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. We do not suggest that a private litigant has the burden of conclusively establishing the feasibility of such alternatives. Rather, in the light of the stipulated facts which show the practical need for bulk licensing in order for the market to function (see *supra*, p. 5), petitioner should at least have come forward with evidence demonstrating a reasonable possibility that alternative methods are feasible. That has not been done.

There is no question, of course, that the combination of copyright holders which ASCAP represents requires the closest scrutiny under the antitrust laws. Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck*, 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. Because of the competitive threat represented by ASCAP, the United States sued it under

the Sherman Act in 1941 and obtained a consent decree against it. As conditions change[10] or abuses are disclosed, it may become necessary, as in 1950 (see, pp. 3–4, *supra*), for the government to seek modifications of that decree or to file suit for additional relief.

Private parties, of course, always have the option of seeking relief in their own behalf, nothwithstanding any consent decree accepted by the government. We believe, however, that nothing has been shown on this record to warrant a finding that the antitrust laws have been violated. Accordingly, the court below appears to have reached the correct result."[11]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted:

ERWIN N. GRISWOLD,
Solicitor General.

DONALD F. TURNER,
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DECEMBER 1967.

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[10] For example, the difficult problem of accounting for millions of separate performances each year may ultimately be solved by developments in computer technology. Such a change might warrant a completely new approach to the operation of the market for performance rights to recorded music.

[11] What we say here applies only to the record in this case. Other ASCAP licensing activities are not involved and we take no position concerning them.

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